UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ALPHA KABA,

Plaintiff,

v.

DELIGHT CONSTRUCTION CORP.,

Defendant.

---X

Civil Action No. 08-CV-2594

DEFENDANT'S TRIAL MEMORANDUM

Respectfully submitted,
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Defendant, Delight Construction Corp. (hereinafter "Delight"), by its attorneys, Milman Labuda Law Group PLLC, submits the following as its Trial Memorandum with Proposed Jury Instructions, Trial Witnesses and Exhibits, with supporting case law, in compliance with the Court's Order of November 25, 2009.

1) PROPOSED JURY INSTRUCTIONS

Pursuant to the provisions of Rule 51(a) of the Federal Rules of Civil Procedure, Defendant, Delight Construction Corp., requests that the court issue the following instructions to jurors at the close of the evidence:

STANDARD CIVIL JURY INSTRUCTIONS

A. GENERAL INTRODUCTORY REMARKS

Members of the Jury:

Now that you have heard all the evidence and all of the arguments of counsel, it becomes my duty to give you the instructions of the Court as to the law applicable to this case. It is your duty as jurors to follow the law as I state it to you in these instructions and to apply that law to the facts as you find them from the evidence in the case. You are not to single out any one instruction that I give as stating the only law that is applicable to this case. You must consider and decide this case on the instructions as a whole.

You should understand your key role and ultimate responsibility for the decision in this case. As I told you when we first met, the essential purpose of a trial is to resolve issues of fact. The jury in a case such as this one decides those issues of fact. You are the exclusive and sovereign judges of the facts the parties have disputed by the evidence and argument placed before you. In judging those facts, you should do so reasonably and fairly, by considering all the evidence. You should, of course, use your own good judgment and common sense.

My function at this stage is to review the issues to be decided and to outline for you the rules of law which you will apply to the facts as you find them. These rules, which govern all of us, state the principles to be applied by you in resolving the issues in this case and in conducting your deliberations. I remind you of your important and solemn responsibility as impartial judges of the facts. We count on you with confidence to follow your oath to decide objectively, without passion or sympathy, with cool and rational detachment.

You will realize the importance in our system of equality before the law. All parties come to court as equals in the sense of being entitled to the same benefits, and being held to the same responsibilities, under the law. The nature of the parties is of no consequence to your deliberations, one way or the other. All of the parties have a right to have this case decided fairly under the law.

B. EVIDENCE IN THIS CASE

In performing your crucial responsibility of finding the facts, you must remember that the jury's deliberations are to rest solely and exclusively upon the evidence. Recall at this stage the things that are evidence and the things that are not evidence. The evidence consists of the sworn testimony of the witnesses you have heard and the exhibits that are now part of this record. Pleadings (Complaint and the Answer filed in response) are normally not to be considered as evidence, since they merely set forth the claims of the parties and you are the sole judges of the extent to which the evidence supports those claims.

C. STATEMENTS OF COUNSEL OR JUDGE

Preferences or sympathies in relation to counsel should have no place in your decision and you must not be prejudiced by such. This is a search for truth, not a popularity contest. In making objections and arguments, however the rulings may have gone, these lawyers were doing their assigned jobs throughout. Any preferences as to counsel must be put aside in your deliberations.

Statements made by counsel in their closing remarks or in the asking of questions of witnesses do not constitute any evidence whatsoever in the case and should be disregarded by you as proof of any facts. You should attach no weight to inferences from questions, apart from the sense and meaning of the answers. It is the duty and the right of counsel to address you and explain the testimony to enable you better to understand the questions which you are to decide. However, if counsel inadvertently misstates the law or misstates the evidence, you will follow the law as given to you by the Court in these instructions and not as stated by counsel. Likewise, you will take the evidence detailed by the witnesses and shown by the documents introduced instead of the statements of counsel. However, this does not mean that you must disregard the statements of counsel. If such statements, in your judgment, are of assistance to you in refreshing your memory of the evidence or in evaluating that evidence, you are not compelled to ignore them. The accuracy and the appropriateness of counsel's statements are entirely for you to judge.

D. DIRECT AND CIRCUMSTANTIAL EVIDENCE

There are two types of evidence which you may properly use in reaching your verdict in this case.

One type of evidence is called direct evidence. Direct evidence is evidence presented by a witness who testified as to what that witness saw, heard or observed. In other words, when a witness testifies about what is known to that witness by virtue of the witness's own senses -- what the witness sees, feels, touches or hears -- that is called direct evidence.

Circumstantial evidence is evidence that tends to prove a disputed fact by proof of other facts. When we employ circumstantial evidence to reach a conclusion, we often say that we "infer" one fact from another or that we "draw an inference."

That is all there is to circumstantial evidence. You take an established fact and conclude, on the basis of reason, experience and common sense, that another fact exists or does not exist. Circumstantial evidence is of no less value than direct evidence. It is a general rule that the law makes no distinction between direct and circumstantial evidence. In deciding whether to draw an inference, you must look at and consider all the facts in light of reason, common sense and experience. After you have done that, the question whether to draw a particular inference is for you, the jury, to decide.

E. CREDIBILITY OF WITNESSES

The credibility of the witnesses who testified in this case and the weight to be accorded their testimony will be determined entirely by you.

No fact, of course, may be determined merely by the number of witnesses before you or the volume of the evidence. You are interested primarily in the quality of the testimony and evidence offered and not in its quantity.

There is no magic formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs, you determine for yourselves the reliability or unreliability of statements made to you by others. The same tests that you use in your everyday dealings are the tests you should apply in your deliberations as jurors.

You should carefully scrutinize all the testimony, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive, state of mind and demeanor while on the stand. Consider the witness's ability to observe the matters as to which the witness has testified and whether the witness impresses you as having an accurate recollection of these matters. Consider also any possible bias which the witness might have, either for or against plaintiffs or for or against defendants; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case. In short, you should test the evidence by your own knowledge of human nature and the motives that influence and control human beings.

In deciding whether or not to believe a witness, keep in mind that people sometimes forget things. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident may see or hear it differently. You need to consider, therefore, whether a contradiction is an innocent lapse of memory or an intentional falsehood, and that may depend on whether it involves an important fact or only a small detail.

Where a witness testifies inaccurately and you do not think that the inaccuracy was consciously dishonest, you should bear that in mind in scrutinizing the whole testimony of that witness. If, however, you conclude that a witness has not only testified falsely but has done so intentionally, this fact casts a very serious doubt on all of that witness's testimony, and you might well conclude that you cannot accept any of it.

The significance you attach to an inaccuracy may vary due to the particular fact at issue or the surrounding circumstances which, in your mind, should have impressed it upon the memory of the witness and caused a correct retention of it to be made.

A witness may be discredited or impeached by contradictory evidence, by a showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something or has failed to say or do something which is inconsistent with the witness's present testimony. If you believe that any witness has been discredited or impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you think it deserves.

You are not required to accept testimony even though the testimony is uncontradicted and the witness is not impeached. You may decide, due to the witness's bearing and demeanor, or due to the inherent improbability of the witness's testimony, or for other reasons sufficient to you, that such testimony is not worthy of belief. On the other hand, the testimony of a single witness may be sufficient to convince you of the existence of an essential element or elements of the claim made.

F. NUMBER OF WITNESSES IMMATERIAL

The weight of the evidence is not necessarily determined by the number of witnesses, or even one witness, testifying as to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses, or even one witness, as to any fact is more credible than the testimony of a larger number of witnesses to the contrary. You may, of course, reach the opposite conclusion.

G. DEPOSITION TESTIMONY

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath and swears to tell the truth, and lawyers for each party may ask questions. A court reporter is present and records the questions and answers. During the trial, testimony was presented to you by deposition. You should give this testimony the same consideration you would give it had the witness appeared and testified here in court.

H. STIPULATIONS BY COUNSEL

The parties have stipulated that certain facts are true, and those stipulations have been read to you during this trial. You must therefore treat these facts as having been proved for the purposes of this case.

I. JUDICIAL NOTICE OF FACTS

During the trial, I took judicial notice of certain facts which are not subject to reasonable dispute. I have accepted these facts to be true, even though no direct evidence has been introduced proving them to be true. You are required to accept these facts as true in reaching your verdict.

J. **BURDEN OF PROOF**

In civil actions, such as this one, the plaintiff bears the burden of proving each essential element of his claims by a preponderance of the evidence. I should point out that the burden of proof differs in civil cases from the burden of proof in criminal cases. In criminal cases, the burden of proof is proof beyond a reasonable doubt. That is not the standard here. In civil cases, the burden of proof is proof by a preponderance of the evidence.

To prove by a preponderance of the evidence means to prove that something is more likely true than not true. If one side proves a fact by a preponderance of the evidence, that means the evidence it has presented has more convincing force than the opposing evidence and produces in your minds a belief that what is sought to be proved is more likely true than not true.

It might be helpful to imagine a pair of scales in equal balance. Imagine that you can put the plaintiff's evidence on one side of the scale and the defendant's evidence on the other side of the scale. If the scales tip ever so slightly in favor of the plaintiff, then his evidence preponderates, and he has sustained his burden of proof. If the scales tip the other way, ever so slightly in favor of a defendant, then, obviously, the plaintiff has not sustained his burden of proof as to that defendant. Should you feel that the scales are evenly balanced, that neither party's evidence outweighs the other, then the plaintiff has failed to meet his burden of proving his case against a defendant under consideration by a preponderance of the evidence, and that defendant prevails.

SUBSTANTIVE JURY INSTRUCTIONS

A. General Introductory Remarks

In this case, plaintiff Alpha Kaba brings claims under the federal Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., and the New York State Minimum Wage Act, N.Y. Labor Law § 190 et seq., alleging that defendant Delight Construction Corp. failed to pay him wages and overtime pay. Specifically, plaintiff alleges:

(1) that he was not paid minimum wages while working for defendant;

(2) that he was not paid overtime pay while working for defendant; and

(3) that he was not paid spread of hours pay while working for defendant.

Defendant, Delight Construction Corp., denies that it failed to pay plaintiff minimum wage and overtime and asserts that it paid Mr. Kaba properly when he worked for Delight.

B. The Employer-Employee Relationship

The law provides that an "employer" is any person acting directly or indirectly in the interest of an employer in relation to an employee. 29 U.S.C.A. §203(d). To "employ" someone means to suffer or permit to work. 29 U.S.C.A. §203(e)(1). An employee is only covered under the law if he is engaged in commerce or in the production of goods for commerce. 29 U.S.C.A. §§203(g), 206(a), 207(a).

In order to determine whether an employer-employee relationship exists, a number of factors are to be examined. These factors include: the employer's overall operational control of the corporation, ownership interest in it, control of significant functions of the business, ability to determine the employees' salaries and make hiring and firing decisions. Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 139 (2d Cir. 1999); Jiao v. Chen, 2007 U.S. Dist. LEXIS 96480 at *32 (S.D.N.Y. 2007). You should determine whether an employer-employee relationship exists by looking at the real economic relationship between the employer who uses and benefits from the services of the workers and the employee that hires or assigns the workers. You may examine whether the defendant had and exercised the power to hire and fire the plaintiff, exercised supervision and control over the plaintiff, paid plaintiff's wages, controlled plaintiff's work schedules or maintained records. No single factor is controlling.

Both parties stipulated that plaintiff began working for defendant in May 2006. Defendant contends that it was not plaintiff's employer after November 2006. Plaintiff contends that he was employed by Defendant until April 2008.

C. Joint Employer Status Under Federal Law

An employee may have multiple employers if the employers are not completely disassociated with respect to the employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer. 29 C.F.R. §791.2(b).

Plaintiff contends that Delight and Fye's Home Improvement are joint employers. Defendant contends that it was not a joint employer with Fye's Home Improvement.

D. FLSA Minimum Wage and Overtime

The federal law provides that a non-exempt employee, like plaintiff, be compensated at a rate of not less than the minimum wage per hour for all hours worked up to 40 hours per week. 29 U.S.C. § 206, 207(a) (1). The employee must be paid not less than one-and-one-half times the minimum wage rate for any hours (that is, time-and-a-half) in excess of forty hours per week. 29 U.S.C.A §207(a)(1).

During all relevant times for this case, under federal law, the minimum wage that an employee must be paid was $5.15 an hour. 29 U.S.C. § 206, 207(a) (1). Therefore, the employee must be compensated at the minimum overtime rate of $7.725 for each hour in excess of 40 hours worked per work week. 29 U.S.C.A §207(a)(1).

E. New York State Minimum Wage Law and Overtime

New York law requires that an employee to be paid a minimum wage rate of $6.75 an hour. Under New York law, any employee who works in excess of 40 hours per week must be compensated at the minimum overtime rate of $10.125 an hour. 12 N.Y.C.R.R. §142-2.2. New York law also requires an additional "one hour's pay at the basic minimum hourly wage rate" for each day worked more than ten hours ("spread of hours" pay). 12 N.Y.C.C.R.R. § 142-2.4. This “spread of hours” law not does apply if the plaintiff was paid the equivalent of the extra hour in his base wages. See Jenkins v. Hanac, Inc., 493 F. Supp. 2d 556 (E.D.N.Y. 2007).

If you find that the plaintiff was an employee of defendant at any relevant time and if you find that the plaintiff was improperly paid at any time during said period of employment, then you should find in favor of the plaintiff to the extent that a violation of federal or state law is established by a preponderance of the evidence. If you find that plaintiff was not employed by defendant or was not improperly compensated by a preponderance of the evidence, then you should find in favor of the defendant.

F. Damages

Now, if you have found that the plaintiff has proved his claims by a preponderance of the evidence, then you may consider what damages, if any, are due to him. The fact that I give you instructions on damages should not be taken as an indication that I think that damages should be, or should not be, awarded. That is a determination which is left entirely to you. I am instructing you on principles governing damages awards so that, in the event you should find the defendant liable, you will know on what basis to consider any award of damages.

To that end, if you find in favor of the plaintiff by a preponderance of the evidence, then these damages instructions are applicable. Conversely, if you find in the favor of the defendant, then these damages instructions are not applicable.

G. Federal Actual Damages

The federal law provides that the plaintiff should receive as actual damages the amount of the unpaid wages and his unpaid overtime compensation, and may receive an additional equal amount as liquidated damages. 29 U.S.C.A. §206. The measure of actual damages is the difference between what the plaintiff should have been paid under the federal law and the amount that you find the plaintiff was actually paid. 29 U.S.C.A.

§§206, 207, 216(b). Recovery of back pay is normally limited to two years from the time the complaint was filed, but may be extended to three years if you find that the employers' violation of the federal law was willful. 29 U.S.C.A. §255.

If you find in favor of the plaintiff on his federal claims by a preponderance of the evidence, then these damages instructions are applicable. Conversely, if you find in the favor of the defendant on plaintiff's federal claims, then these damages instructions are not applicable.

H. Federal Liquidated Damages

Under federal law, in addition to actual damages for the lost back pay and overtime wages, you must award an additional equal amount of the actual damages as liquidated damages (in other words, double the actual damages) unless the defendant proves it acted in good faith and had reasonable grounds for believing that its conduct was not in violation of the federal law. See Rodriguez v. Farm Stores Grocery, Inc., 518 F.3d 1259, 1272 (11th Cir. 2008); Lorillard v. Pons, 434 U.S. 575, 582 n.8 98 S. Ct. 866, n.8 (1978). The employer has the burden of proof to show that its failure to comply with the federal law was in good faith and that it had reasonable grounds for the belief that it was in compliance. Therefore, defendant must establish it had an honest intention to ascertain and follow the dictates of the federal law and that they had reasonable grounds for believing that their conduct complied with the federal law. Therefore, if you find that defendant have not met their burden of proof, you must find for the plaintiff and award as liquidated damages against the defendant an amount equal to the actual damages under federal law lost by plaintiff. 29 U.S.C.A. §§216(b), 20; 29 C.F.R. §§790.15, 790.22(c).

If you find in favor of the plaintiff on his federal claims by a preponderance of the evidence, then these damages instructions are applicable. Conversely, if you find in favor of the defendant on plaintiff's federal claims, then these damages instructions are not applicable.

I. New York State Law Damages

Under New York State law, if an employer pays an employee less than the wage to which he is entitled under New York law, he may recover the amount of any such under payments. In addition, if such underpayment was willful, he may recover an additional amount as liquidated damages equal to twenty-five percent of the total of such under payments found to be due him. New York Labor Law § 198(1-a).

Therefore, if you find by a preponderance of the evidence that plaintiff was paid by defendant less than the wage to which he was entitled under the provisions of the New York State law, you must award to plaintiff the total amount of the unpaid wages and his unpaid overtime compensation. If you further find that defendant's conduct in failing to pay plaintiff overtime wages was willful you must award to plaintiff an additional amount equal to twenty-five percent of the total of such under payments found to be due plaintiff.

If you find in favor of the plaintiff on his state claims by a preponderance of the evidence, then these damages instructions are applicable. Conversely, if you find in favor of the defendant on plaintiff's state law claims, then these damages instructions are not applicable.

J. SPECIAL VERDICT FORM (INTERROGATORIES)

Let me explain the procedure you will be following in connection with your decision making in this case. You are going to be asked to answer several questions that concern the issues in this case. A set of those questions will be distributed to each of you when you retire to begin deliberations. Fill out only the set with room for the foreperson's signature and return it to the court.

Many questions you will be asked to answer can be answered "yes" or "no." Several of the questions need be answered only if a certain answer or answers have been given to a previous question or questions. You should not answer any question one way to avoid answering a later question, but it may turn out that you do not have to answer every question. Each question that you answer should be given individual consideration.

Do not assume from the wording of any question or from the fact that a question is asked that there is any particular answer that you are supposed to give. Your answers should be given solely on the basis of your assessment of the evidence and the application of these instructions of law.

K. CONCLUSION

You may now retire to the jury room. Elect one of your members as foreperson. The foreperson is in no way more important in your deliberations. His or her function is to pass any requests for clarification of these instructions or something of that nature on to me, and to announce your verdict.

If you do have such requests, please give them to the Marshal, in writing, and he or she will bring them to me. Be careful to give us no indication of the status of your deliberations when you make such requests; we are not permitted to know anything about how fast or slow you are proceeding, or whether you are divided in your positions, or any other information about what is taking place in the jury room.

As you proceed to your deliberations in the jury room, determine the facts on the basis of the evidence as you have heard it, and apply the law as I have outlined it to you. Render your verdicts fairly, uprightly, and without a scintilla of prejudice.

Although all jurors must agree before a verdict can be rendered, it is nevertheless the duty of each of you to discuss and consider the evidence and the opinions of the other jurors. If, in the course of your deliberations, you become convinced that the views you held are erroneous, do not hesitate to reexamine those views and change your opinion. Ultimately, however, you must decide the case for yourself. Do not surrender your beliefs as to the proper weight of the evidence solely because of the opinions of other jurors or for the mere purpose of returning a verdict.

2) DEFENDANT'S PROPOSED LIST OF WITNESSES

Defendant expects to call the following witnesses in its case-in-chief:

1. Mohammed Aziz – Delight's President and Owner

Mr. Aziz's testimony will include but may not be limited to the following: information regarding the business of Delight Construction, its history of using subcontractors to perform services to the company, Delight's hiring of the Plaintiff as a security guard in May 2006, Mr. Aziz's conversations with Plaintiff regarding his rate of pay, hours of work and days of employment, the termination of Plaintiff's employment in November 2006, Delight's decision to revert to its prior practice of subcontracting out security work in November 2006, conversation with Mohammed Fye about utilizing his company, Fye's Home Improvement ("Fye's"), as a security contractor, the hiring of Fye's in November 2006, and Fye's work as a subcontractor from November 2006 to April 2008.

2. Elena Frescas – Delight's Former Bookkeeper

Ms. Frescas' testimony will include but may not be limited to the following: Delight's payroll and record-keeping practices, the records kept by Delight concerning

Plaintiff's employment, and Delight's use of outside subcontractors to perform work for Delight.

3. Mohammed Fye – Owner of Fye's Home Improvement

Ms. Fye's testimony will include but may not be limited to the following: the history of Fye's individual and business relationship with Delight, Fye's employment of the Plaintiff following his termination from Delight, Fye's supervision and control over Plaintiff during his employment with Fye's and Plaintiff's termination from Fye's employment.

4. Razzaque Chokder – Former Employee of Delight Construction

Mr. Chokder's testimony will conclude but not be limited to the following: his role as a project manger for Delight and his interactions with the Plaintiff during the time that Plaintiff was employed by Delight as a security guard.

3) DEFENDANT'S PROPOSED LIST OF EXHIBITS

Defendant has pre-marked the following exhibits:

A. Security Logs and corresponding checks for Aliou Sylla from 2/5/06 to 8/20/06
B. EIN Cover Sheet for Mahamadou Fye
C. Certificate of Liability Insurance for Mahamadou Fye d/b/a Fye's Home Improvement
D. Vendor Ledger from 8/1/04 to 10/31/08 for Kaba Alpha Kabine
E. Alpha Kaba Kabine 2006 Form 1099-MISC from Delight Construction
F. Security Logs and corresponding checks for Kaba Alpha Kabine from 5/16/06 to 11/21/06
G. Signed Agreement for Security Guard Services between Fye's Home Improvement and Delight Construction Corp.
H. Certificate of Workers Compensation Insurance for Mahamadou Fye d/b/a Fye's Home Improvement
I. Fye's Improvement invoices and corresponding checks from 11/27/06 to 5/5/08
J. Fye's Home Improvement 2007 Form 1099-MISC
K. Aljune Construction Contract and Invoices
L. Delight subcontractor invoices and contract

4) DEPOSITION DESIGNATIONS AND CROSS-DESIGNATIONS:

Defendant intends to introduce portions of the deposition testimonies of Elena Frescas, Mohammed Aziz, Mohammed Fye and Alpha Kaba. Defendant respectfully reserves the right to also utilize portions of these depositions for impeachment or rebuttal.

Dated: Lake Success, New York
December 3, 2009

Respectfully submitted,

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/s/

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